No. 83-1940

In the Supreme Court of the United States

October Term, 1983

ARMIN GROSZ, SARAH GROSZ and NAFTALI GROSZ,
Petitioners,

vs.

THE CITY OF MIAMI BEACH,
a municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT CITY OF MIAMI BEACH IN OPPOSITION

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QUESTION PRESENTED

The question presented by the petition is whether, under the particular facts of this case, the City of Miami Beach had the right to enforce its zoning law to stop Petitioners from using their home as a synagogue in a single-family residential area of the City.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is contained in Petitioners' Appendix pp. 1-27. The opinion of the District Court is contained in Petitioners' Appendix pp. 28-40.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1983. Petitioners filed a Petition for Rehearing and *en banc* consideration which was denied by the Eleventh Circuit on February 28, 1984. The jurisdiction of this Court has been invoked by Petitioners under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The First Amendment to the United States Constitution:

I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. The City of Miami Beach Zoning Ordinance 1891 has been set forth in Petitioners' Appendix "E".

STATEMENT OF THE CASE AND THE FACTS

Petitioners' statement of the facts is unsupported by the Record. Petitioners have made assertions of fact which are contrary to their stipulation of the facts below.

Petitioners stipulated below that the prayer services they conducted at their home were for reasons of personal convenience as opposed to religious belief (see paragraph 5 of the stipulation); they now seek to evade that stipulated fact by asserting, for the first time, that they are precluded from driving or walking "great distances" on the Sabbath, an assertion which is not supported by the Record. The stipulated facts are that Petitioners were *not* immobile and could lawfully operate their synagogue only four blocks from their home. Moreover, as shown in greater detail below, Petitioners asserted no religious need except to pray twice-daily in the company of ten adult males, which the City has never objected to (R-1, 2; 51, 390); Petitioners therefore do not have to travel at *all* to satisfy their relig-

ious needs. (In fact, Petitioners even stipulated below that there was no *religious* reason for holding their daily minyan services in their home, but the City has never objected to those services anyway.)

Petitioners' statement that the use of their home as a synagogue was necessary as a matter of religious belief is therefore contrary to the stipulated facts. Petitioners stipulated that they were not required by their religious beliefs to engage in the activities which the City of Miami Beach sought to stop. Paragraphs 5, 6 and 9 of the stipulation reveal that the City sought *only* to stop Petitioners from doing that which Petitioners *acknowledged* was not required by their religious beliefs; the City did not seek to stop Petitioners from doing that which Petitioners asserted a religious need to do, or even from doing that which Petitioners admitted they had no religious need to do. Indeed, the truth is that Petitioners stipulated below that there was no case or controversy at all between the parties, since the City was not objecting to *anything* Petitioners asserted a desire to do, and since Petitioners admitted they were doing what they had no religious or other need to do. Stipulation, paragraphs 5, 6, and 9. Accordingly, when Petitioners state to this Court that they "demonstrated" a religious need to conduct their services in the home, they are contradicting their own stipulation and their own expert witness on religion who testified that Petitioners had no religious reason or need at all to operate their home as a synagogue.

Petitioners also misrepresent the facts when they assert that they were not using their home as a center of organized religious activity. The *stipulation* describes what Petitioners were doing and is confirmed and amplified by the testimony and evidence in the Record showing that Petitioners were operating a synagogue in their home:

—Petitioners were not in fact praying in the company of "ten relatives or neighbors", as Petitioners had alleged in their lawsuit, but rather were conducting twice-daily religious services, attended by up to *fifty* or more persons, many of whom were strangers and non-residents using the facility as their principal place of worship in the City, in a structure specifically remodeled, equipped and used as a synagogue. Stipulation, paragraphs 3 and 6; R-1, and 2.

—Petitioners solicited persons off the street to attend the services and accepted contributions from the participants. Stipulation, paragraphs 3, 5, 6 and 7; Armin Grosz deposition, pp. 18, 28.

—Petitioners and the parties' witnesses repeatedly referred to the Petitioners' congregation as a "Shul" or synagogue. Stipulation, paragraph 6; R-383; A. Grosz deposition, pp. 20-21, 62; N. Grosz deposition, pp. 28, 30.

—Petitioner knowingly purchased the home in the *only* zone of the City which was exclusively for single-family residential use and which excluded churches and synagogues. After being specifically told by the City that they could not use the home as a synagogue, Petitioners remodeled the interior of the structure as a synagogue after procuring a building permit from the City with the misrepresentation that they intended to use the structure as a "playroom". Stipulation, paragraphs 2 and 3.

—Petitioners conducted religious services in the facility twice a day, every day of the year, and each service lasted between one-half hour and three hours. Stipulation, paragraph 7.

—Naftali Grosz is the leader of an orthodox Jewish sect and uses the structure to lead his sect's services. Stipulation, paragraph 5.

Petitioners' representation that the evidence "demonstrated" that they were not using the home as a center of organized religious activity is thus totally contrary to the Record and contrary to Petitioners' own stipulation of the facts.

Finally, it is inaccurate for Petitioners to state that the Court of Appeals advanced no compelling state interest for mandating that the Petitioners be required to give up their religious practices. Rather, the Circuit Court held that under the stipulated facts, Petitioners' religious needs had not been impaired. That being the case, the City's interest in enforcing its zoning ordinance plainly outweighed Petitioners' demand to make unbridled use of their property as a synagogue.

ARGUMENT

This Court should not take jurisdiction in this case for the very simple reason that Petitioners never suffered any infringement of their First Amendment rights, much less a substantial or significant infringement.

Petitioners argue that the Court of Appeals failed to follow this Court's precedent by not requiring the City to demonstrate a compelling interest in having a zoning plan which preserves one area of the City for exclusively residential purposes. Petitioners failed, however, to show how the restriction under the City's zoning law actually burdened their freedom of religion. *See*

Abington v. Schempp, 374 U.S. 202 (1963); *Wilson v. Block,* 708 F.2d 735, 740 (D.C.C. 1983): "Only if a burden is proven does it become necessary to consider whether the governmental interest is compelling . . .". Petitioners failed to show any substantial or even significant infringement of their religious beliefs due to the government's refusal to permit them to use their home as a synagogue in the *only* area of the City prohibiting that conduct. On the contrary, Petitioners stipulated and the facts demonstrated that the City's enforcement of its zoning law did not impair any central or fundamental element of Petitioners' religion. In fact, the parties stipulated that the City's action did not constitute an intrusion on Petitioners' religious beliefs or practices at all. *Lakewood Ohio Congregation of Jehovah's Witnesses v. City of Lakewood,* 699 F.2d 303, 305-306 (6th Cir. 1983), *cert. den.,* 104 S.Ct. 72 (1983). As they alleged in their complaint, Petitioners unquestionably believe that twice-daily they must hold a minyan (a prayer service requiring ten adult males) and the City has never objected to that practice even if it occurred in Petitioners' home, even though Petitioners admitted that while it is more personally convenient for them, there is no religious reason for preferring to conduct the minyan in the home. The City only objected to Petitioners operating a *synagogue* in their home, in the manner described by the stipulation and the Record. At first Petitioners denied operating a religious center in the home, but the facts were clear and ultimately Petitioners signed a stipulation describing the facts and admitting they had *no religious reason at all* to engage in such conduct in their home. Petitioners conceded that nothing the City sought to prevent Petitioners from doing was central or indis-

pensable to Petitioners' religion. *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980).[1]

Government interference with personal preference cannot constitute a substantial infringement on religious rights which requires the City to show a compelling justification for its law.

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. The statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday or Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Braunfeld v. Brown, 366 U.S. 599, 606 (1961). Personal preference and individual convenience can hardly be a justification for the issuance of a "First Amendment variance" to every private association, religious or political group, commune or publishing company wishing to operate in a private home, especially where as here the City *specifically* authorizes such activities virtually everywhere

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1. The Court in *Sequoyah* concluded that the flooding of the Little Tennessee Valley, while depriving the Cherokee Indians of the ability to worship there, did not deprive them of a geographic location "indispensable" or "central" to the Indians' religious observances. *Sequoyah* at 1164.

else within the City.[2] *See Young v. American Mini Theaters,* 427 U.S. 50 (1976); *Grayned v. City of Rockford,* 408 U.S. 102, 115 (1972), regarding reasonable time, place and manner regulations in furtherance of significant government interest. See also *Holy Spirit Association, etc. v. Town of Newcastle,* 480 F.Supp. 1212 (S.D.N.Y. 1979).

Even if Petitioners had asserted and shown that there was special religious significance in the use of their home for the purposes they were using it, which they stipulated was not the case, the City's demand that they engage in such operations elsewhere in the City would not be a substantial infringement on Petitioners' First Amendment rights. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972) (criminal penalties); *Sherbert v. Verner,* 374 U.S. 398 (1963) (withholding of crucial economic benefits). Petitioners' brief must be viewed against the background of over thirty years of state and federal case law upholding, against similar freedom of religion claims, local zoning laws which in some instance totally excluded churches or parochial schools from large portions of the City. As noted above, here it is a stipulated fact that Petitioners could freely and unconditionally operate in at least 12 other zones of the City, including *any other residential* zone of the City and including an area less than 4 blocks from their home. Compare *Chico v. First Avenue Baptist Church,* 238 P.2d 587 (Cal. App. 1951)

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2. The Stipulation and Record reflects that *every other* commercial, mixed-use and residential zone of the City of Miami Beach unconditionally permits the operation of churches and synagogues, including every purely residential zone of the City except for the *one* zone Petitioners selected to use as a religious center. As shown by the Stipulation and the Record, well over 50% of the City is unconditionally zoned to allow the operation of churches and synagogues (including an area of the City four blocks from Petitioners' home.) R-293, 295.

and *Corporation of Presiding Bishops v. Porterville,* 203 P.2d 823 (Cal. App. 1949), *app. dism'd,* 338 U.S. 805 (1949), with *Ellsworth v. Gercke,* 156 P.2d 242 (Ariz. 1945) and *Englewood v. Apostolic Church,* 362 P.2d 172 (Colo. 1961). See also *Town v. State ex rel. Reno,* 377 So.2d 648 (Fla. 1980), *cert. den.,* 101 S.Ct. 48 (1980), involving facts which are conceptually indistinguishable from those present here.

The Supreme Court's position on a state's decision to permit its local government to exclude churches from residential neighborhoods is best seen in *Corporation of Presiding Bishops, etc., supra,* in which this Court dismissed an appeal, for want of a substantial Federal question, from a state Supreme Court decision upholding an ordinance excluding churches from a residential zone of a City. This Court later explained:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nations is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

American Communications Association v. Douds, 339 U.S. 382, 397-398 (1950). See also *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974).

With respect to Point II of Petitioners' brief, concerning the application of local zoning laws to the *use* as opposed to the *outward appearance* of property, that issue was never raised by Petitioners in the courts below.

Petitioners state that because the facade of their home complied with the zoning restrictions, this case is "novel" in that the structure involved is "entirely conforming to the applicable zoning regulations". There is nothing "novel" in a City zoning law applying to the use of property; indeed all zoning laws do so and the Miami Beach law does too. (The law at issue here specifically applies to "single-family, residential and accessory *uses*".) *See Palo Alto Tenants' Union v. Morgan,* 487 F.2d 883 (9th Cir. 1973), *cert. den.,* 94 S.Ct. 2608 (1974), and *Village of Belle Terre, supra.*

CONCLUSION

The Petition for a Writ of Certiorari should be denied, because the Court of Appeals followed the precedents of this Court in reaching its opinion. As such, jurisdiction for consideration of this case is lacking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 12th day of July, 1984 to SAMUEL I. BURSTYN, ESQ., 3050 Biscayne Blvd., Suite 200, Miami, Fl. 33137; JESSE L. McCRARY, JR., ESQ., 3050 Biscayne Blvd., 8th Floor, Miami, Fl. 33137; CHRISTINE P. TATUM, ESQ., Asst. City Attorney, City of Hollywood, 2600 Hollywood Blvd., Hollywood, Fl. 33020, and ROBERT KLEIN, ESQ., Two South Biscayne Boulevard, One Biscayne Tower, Suite 2400, Miami, Florida 33131.

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